No. 85-1708

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF CALIFORNIA, *et al.*,

Appellants,

vs.

CABAZON BAND OF MISSION INDIANS, *et al.*,

Appellees.

On Appeal from
the United States Court of Appeals
for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE PUEBLO OF SANDIA, THE PUEBLO OF ACOMA, THE PUEBLO OF TESUQUE, AND THE PUEBLO OF SAN JUAN IN SUPPORT OF THE POSITION OF APPELLEES

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MOTION OF THE PUEBLO OF SANDIA, THE PUEBLO OF ACOMA, THE PUEBLO OF TESUQUE, AND THE PUEBLO OF SAN JUAN FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

THE PUEBLO OF SANDIA, THE PUEBLO OF ACOMA, THE PUEBLO OF TESUQUE, and THE PUEBLO OF SAN JUAN hereby respectfully move the Court for leave to file the attached Brief *Amici Curiae* in the above-entitled cause. The written consent of the attorneys for Appellees, The CABAZON BAND OF MISSION INDIANS and the MORONGO BAND OF MISSION INDIANS, and the attorneys

for Appellants, THE STATE OF CALIFORNIA, et al., have been obtained.

THE PUEBLOS OF SANDIA, ACOMA, TESUQUE, and SAN JUAN ("AMICI INDIAN PUEBLOS") have a substantial interest in this case, which interest is more fully set forth in the attached Brief in Support of the Appellees' Position, because

1. AMICI INDIAN PUEBLOS are federally-recognized Pueblo Indian tribes located within the exterior boundaries of the State of New Mexico.

2. AMICI INDIAN PUEBLOS have bingo operations within the exterior boundaries of their reservations located within the State of New Mexico.

3. The decision in the captioned cause may be determinative of the operations of the bingos located within the exterior boundaries of AMICI INDIAN PUEBLOS. If the decision below is reversed, the ability of the AMICI INDIAN PUEBLOS effectively to deal with and control their bingo operations may be significantly altered in that such reversal may have the effect of directly impacting the successful economic benefits that have accrued from the operation of bingos, upon which bingo operations the AMICI INDIAN PUEBLOS have relied for financial and economic livelihood.

4. The issues raised in this cause and discussed in the attached Brief *Amici Curiae* may have a direct and immediate impact on the AMICI INDIAN PUEBLOS.

For the reasons set forth herein the AMICI INDIAN PUEBLOS request that their Motion for Leave to File the accompanying Brief *Amici Curiae* be granted.

Respectfully submitted,

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QUESTION PRESENTED

Can a State law and local ordinance regulating the operation of bingo games be applied to prevent Federally-recognized Indian tribal governments from conducting bingo games on their reservations, where such games are sanctioned by the U.S. Department of Interior and provide the main source of revenue and employment for the tribes?

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE POSITION OF APPELLEES

The *amici curiae*, THE PUEBLO OF SANDIA, THE PUEBLO OF ACOMA, THE PUEBLO OF TESUQUE, and THE PUEBLO OF SAN JUAN (hereinafter "AMICI INDIAN PUEBLOS"), respectfully request that this Court affirm the decision of the United States Court of Appeals for the Ninth Circuit, declaring that a State and County cannot apply their regulatory laws on the Appellees' Indian reservations and leaving intact the mandates of tribal sovereignty inherent in the Federal policy of tribal self-determination. Appellants and Appellees have consented in

writing to the filing of this brief in support of Appellees.

INTEREST OF THE *AMICI CURIAE*

The AMICI INDIAN PUEBLOS are individual Federally-recognized Indian tribes located within the State of New Mexico and have on-going bingo operations on their respective reservations, with the approval and assistance of the Secretary of Interior.

The decision below correctly held that a State and County may not apply their regulatory laws to Indian tribes operating on their reservations; if this decision is reversed and States and Counties are permitted so to apply their regulatory laws, it will undermine the right of tribes to make their own laws, contravene Federal interests in Indian affairs, destroy tribes' capacity to generate revenue for tribal activities and to provide employment for tribal members; open the door to State and County control over tribal commercial enterprises; and violate constitutional protections afforded Indian tribes.

SUMMARY OF ARGUMENT

The doctrine of Federal pre-emption prohibits the application of State and local laws from interfering with Indian bingo enterprises. Federal pre-emption is based on a national policy mandating Indian economic self-sufficiency, and is further manifested by an overwhelming Federal presence by way of a specific constitutional provision, statutes, regulatory schemes, and actions of the Federal government. The application of State and local laws to Indian bingo would impermissibly infringe on the right of Indians to make their own laws and be ruled by them. An affirmance

of the analysis in the court decision below is necessary so that a consistent application of P.L. 83-280 can be made as to tribes located in all States.

ARGUMENT

I. ENFORCEMENT OF STATE LAWS REGULATING INDIAN BINGO IS PRE-EMPTED BY FEDERAL LAW.

State laws are invalidated by the exercise of a substantive constitutional power implemented by the Supremacy Clause of the Constitution which declares treaties and Federal statutes to be "the supreme law of the land . . . . anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. Constitution, Art. VI, cl. 2. Under the doctrine of pre-emption, Federal involvement in a field precludes State action in the same field. *Perez v. Campbell*, 402 U.S. 637 (1971); *Chicago & Northwestern Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981). This Court has ruled that State law must defer to Federal actions where any of the following three elements exists: (1) the scheme of Federal legislation is so complete and pervasive that no room is left for the State to supplement it; (2) the Federal interest is so dominant that State laws in the same subject must yield; or (3) the enforcement of the State statute presents a substantial conflict with the administration of the Federal program. *Commonwealth of Pennsylvania v. Nelson*, 350 U.S. 497 (1956), *reh. denied*, 351 U.S. 934 (1956). The underlying rationale of the pre-emption doctrine is simply that the Supremacy Clause of the Constitution invalidates State laws that interfere with or are contrary to Federal action. Furthermore, Federal pre-emption is not limited by the

absence of an explicit statement of pre-emption. State authority will be displaced if the intent to pre-empt is implicit in Federal action as would be contained in a Federal statute of structure and purpose. Such intent may be inferred when Federal superintendence of the field and the Federal interest are so dominant that the Federal system will be assumed to preclude enforcement of any State laws on the same subject. *San Diego Unified Port District v. Gianturco*, 651 F.2d 1306 (9th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982). When the exercise of State power frustrates or obstructs the objectives of legitimate national policy or State action stands as an obstacle to the accomplishment of the full purposes and objectives of a Congressional act, then it is clear that State actions are pre-empted by national policy. *Chicago & Northwestern Transportation Co., supra*; *San Diego Unified Port District v. Gianturco, supra.*

Indian affairs occupy a unique and significant place in the application of the doctrine of pre-emption. The Supreme Court has consistently followed the principle that the constitutional scheme, which includes Indian treaties, executive orders, and statutes, delegates paramount authority over Indian affairs to the Federal government. A singularly important factor in limiting State power over Indians is tribal sovereignty under the protection of Federal law. The Indian pre-emption decisions are highly protective of tribal self-government in Indian country and allow minimal application of State law. In Indian country, the application of State law is antithetical to tribal sovereignty, absent a specific Federal statute making that accommodation. *Cohen's Handbook of Federal Indian Law*, 1982 Ed., p. 270. Although the absolute barrier to State

jurisdiction in Indian country found in the case of *Worcester v. Georgia*, 31 U.S. 515 (1832), has been modified over the years toward some concurrent jurisdiction between the States and the Federal government, the Supreme Court and other Federal Courts have consistently stated that, generally, State laws do not apply to Indian country except when Congress has expressly provided that State law shall apply. *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973). The unique historical origins of tribal sovereignty and the right to tribal self-government are pervasive in Indian pre-emption cases and are the foundation for State exclusion.

Under the Indian Commerce Clause, Art. I, Section 8, cl. 3, Congress has broad power to regulate Indian Affairs. *United States v. Wheeler*, 435 U.S. 313 (1978). In recent times, this Congressional authority and the unique legal position of Indian tribes have given rise to a particular judicial analysis for deciding pre-emption questions. The courts have established "two independent but related barriers to the assertion of State regulatory authority over tribal reservations and members." First, the exercise of such State authority may actually be pre-empted by the existence of a Federal law or Federal regulatory scheme covering the topic in question. Second, the State regulation may unlawfully infringe on the right of reservation Indians to make their own laws and to be ruled by them. *Ramah Navajo School Board v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Williams v. Lee*, 358 U.S. 217 (1959). Either of these barriers standing alone is sufficient to prevent a State law or State action from interfering in

activities undertaken on reservations or by tribes. Pursuant to these standards by which the validity of State action is judged, the courts have included in their pre-emption analysis two significant considerations. One is the traditional and historical basis of tribal sovereignty, and the other is the recognition and encouragement of that sovereignty in Congressional acts which promote tribal independence and economic development. As discussed below, application of the State's laws to the conduct of tribal bingo operations on the reservation are pre-empted under both of the above-described barriers, that is, under the Federal regulatory scheme promoting Indian economic independence, and the inherent Indian right of self-government.

II. STATE JURISDICTION OVER INDIAN BINGO ACTIVITIES IS PRE-EMPTED BY FEDERAL NATIONAL POLICY, FEDERAL STATUTE, FEDERAL REGULATIONS, AND CONGRESSIONAL ACTION.

A. Tribal economic self-sufficiency and economic development are actively encouraged and supported by our national Federal policy.

It is clear that, in determining the nature and extent of national policy, courts look far beyond express language of Congressional acts; they also look to the implication and operation of Federal regulations and policies. *Ramah, supra; White Mountain Apache, supra.* A central issue in this case is the role of the Federal government in actively supporting and promoting Indian activities which contribute to economic self-sufficiency and development. Indian bingo is a vital means by which economic independence is achieved. Indian bingo enterprises create jobs for

tribal members and provide a source of revenue for operating tribal governments. Federal Indian policy is to encourage and foster economic development on the reservation itself. Indeed, this Court has specifically recognized the firm Federal commitment to tribal economic independence. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 322 (1983); *White Mountain Apache*, *supra*. The Federal government has clearly indicated through Congressional, executive, and administrative actions that Indian economic self-sufficiency, attained in large measure through the establishment of revenue-generating tribal enterprises, such as bingo, on the reservation itself, occupies a paramount position in our current national policy.

The staunch commitment to improve economic conditions on reservations has been a Federal policy for a substantial time. President Richard Nixon, in 1970, stated, ". . . it is critically important that the Federal government support and encourage efforts which help Indians develop their own economic infrastructure."[1]

Congress has repeatedly expressed the national policy of promoting Indian economic development on reservations. Among the legislation is the Indian

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[1] Immediately preceding this conclusion, the President commented as follows:

> Economic deprivation is among the most serious of Indian problems. Unemployment among Indians is ten times the national average; the unemployment rate runs as high as eighty percent on some of the poorest reservations. Eighty percent of reservation Indians have an income which falls below the poverty line; the average annual income for such families is only $1,500.

(President of the United States, Recommendations for Indian Policy, H.R.Doc. No. 363, 91st Cong. 2d Sess. 7 (1970).

Financing Act of 1974, 25 U.S.C. 1451-1543, which provides Federal funds for such development.[2] Congress has continued to reauthorize and fund this Act, *e.g.*, 25 U.S.C. 1451, *et seq.* Also in 1974 Congress passed the Native American Programs Act of 1974, 42 U.S.C. 2991, *et seq.*, to fund the operation of Indian programs to pursue similar objectives.[3]

The Federal government's long-standing commitment to stimulating economic development and growth and to increasing tribal business enterprises on the reservation was recently expressed in the current Administration by President Ronald Reagan. In a January 24, 1983, Presidential Statement on Indian Policy, President Reagan states,

> It is important to the concept of self-government that tribes reduce their dependence

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[2] In the legislative history of this Act, it is stated:

> One of the most serious problems on the Indian reservations is the inadequate availability of financial resources to permit the Indian people to develop their own resources and potential. All the traditional indicators of economic levels place Indians and Indian reservations at the bottom of the scale. On every reservation today, there is almost a total lack of economic community. If the long-sought goal of Indian self-sufficiency is to be reached, such financial assistance must be provided or facilitated.

1974 U.S. Code Cong. & Ad. News, p. 2874.

[3] This Act specifically states that its purpose is to "increase the economic and social service self-sufficiency of the Indian people. This is in line with the whole concept of self-determination which has as its main function to build the capacity of tribal governments and off-reservation Indians to make decisions and to manage programs which affect their social and economic conditions."

> on Federal funds by providing a greater percentage of the cost of their self-government. . . . The economies of American Indian reservations are extremely depressed, with unemployment rates among the highest in the country. Indian leaders have told this Administration that the development of reservation economies is their Number 1 priority. Growing economies provide jobs, promote self-sufficiency, and provide revenue for essential services. . . . Since tribal governments have the primary responsibility for meeting the basic needs of Indian communities, they must be allowed the chance to succeed.[4]

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[4] The complete text of the portion of the President's statement from which these comments were extracted states:

> It is important to the concept of self-government that tribes reduce setheir dependence on Federal funds by providing a greater percentage of the cost of their self-government. Some tribes are already moving in this direction. This Administration pledges to assist tribes in strengthening their governments by removing the Federal impediments to tribal self-government and tribal resource development. Necessary Federal funds will continue to be available. This Administration affirms the right of tribes to determine the best way to meet the needs of their members and to establish and run programs which best meet those needs.
>
> Without sound reservation economies, the concept of self-government has little meaning. . . . This Administration intends to remove the impediments to economic development and to encourage cooperative efforts among the tribes, the Federal government, and the private sector in developing reservation economies.
>
> The economies of American Indian reservations are extremely depressed, with unemployment rates among the

Recent expressions of the national policy of commitment to development of reservation commercial enterprises state that "actions are needed to create a positive environment for the development and growth of reservation economies." Exec. Order No. 12401, 48 Fed. Reg. 2309 (1983) (President Reagan establishing the Presidential Commission on Indian Reservation Economies). It is indisputable that the achievement of increased Indian economic independence and self-sufficiency through the establishment of Indian-owned and managed, revenue-generating enterprises such as bingo is and has been a major goal of our Federal Indian policy. In order affirmatively to facilitate the attainment of this goal, the Secretary of Interior has issued a plethora of regulations and procedures to establish and implement programs to "stimulate and increase Indian entrepreneurship and employment through establishment, acquisition, or expansion of profit-making, Indian-owned economic enterprises which will contribute to the economy of a reservation." For example, the Secretary of Interior administers a program specifically to make loans to Indians for economic enterprises operated for profit on reservations (25 CFR Chapter 1, Section 101.1, *et seq.*); a program for special grants for tribal facilities

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highest in the country. Indian leaders have told this Administration that the development of reservation economies is their Number 1 priority. Growing economies provide jobs, promote self-sufficiency, and provide revenue for essential services.

It is the policy of this Administration to encourage private involvement, both Indian and non-Indian, in tribal economic development. . . . Since tribal governments have the primary responsibility for meeting the basic needs of Indian communities, they must be allowed the chance to succeed.

or reservation resources for the purpose of profit (25 CFR Section 278.1, *et seq.*); and a program for guaranteed loans and interest subsidies for economic enterprises contributing to the economies of Indian reservations (25 CFR Section 103.1, *et seq.*). Substantial and direct financial assistance has been made to Indian bingos.[5]

The above discussion makes it abundantly clear that every branch of the Federal government—the executive, the legislative, and the administrative—actively and aggressively supports, promotes, and assists in establishing economic enterprises such as Indian bingo for the purpose of generating funds to be used for legitimate and vital tribal services. Such an unquestioned, comprehensive, and long-standing commitment inherent in our Federal national policy pre-emptively obviates State assertion of control over bingo operations on Indian land.

B. The operation of bingo enterprises by the AMICI INDIAN PUEBLOS is exemplary in furthering the mandates of the Federal policy of Indian economic self-sufficiency.

For the AMICI INDIAN PUEBLOS the profits from bingo operations have provided immense economic benefits to tribes and tribal members. The revenues generated from bingo have allowed the tribes

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[5] Among the grants made by the Department of Interior toward tribal bingo operations are (1) a grant in the amount of $125,000 to Sisseton-Wahpeton Tribe in South Dakota; (2) a grant in the amount of $477,000 to Bois Forte Tribe on the Nett Lake Reservation in Minnesota; (3) a grant of $500,000 to Pequot Tribe in Connecticut; and (4) a grant of $100,000 to Stockbridge-Munsee Tribe in Wisconsin. Records of Bureau of Indian Affairs, Central Office, Division of Financial Assistance.

to create jobs for their members, thus reducing unemployment on their reservations; to increase the standard of living on the reservations; to fund tribal government and public projects to provide services to their members; and to contribute to charitable organizations. (Turning to bingo is historically consistent; games of chance have been a part of Pueblo traditional practices since ancient times.) Indeed, the Federal judiciary has sent a clear and unequivocal message to Indian country that bingo is a legitimate source of increasing tribal revenue on the reservation that is beyond State jurisdiction. *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied* 455 U.S. 1020 (1982); *Barona Group of Capitan Grande Band v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983). Through bingo revenues, AMICI INDIAN PUEBLOS have been successful in providing services for tribes and tribal members. Except for bingo revenues, these funds simply would not be available. Further explication of the experiences of the AMICI INDIAN PUEBLOS follows.

1. PUEBLO OF SANDIA

The Pueblo of Sandia's on-reservation bingo enterprise has been in operation since January, 1984. As of August 26, 1986, bingo has generated an enterprise equity of $839,687. These monies have been utilized to fund tribal government operations and to support numerous public projects for the benefit of the tribal members. These profits have allowed contributions to worthwhile charitable organizations and have provided

the necessary capital to allow the Pueblo to initiate other tribal enterprises.[6] Furthermore, the bingo operation has significantly reduced unemployment on the reservation during the past two and one-half years from approximately 12% to 3%.[7] Moreover, the bingo building was financed through a Bureau of Indian Affairs direct loan, and the paved road leading to the bingo building was constructed by the Bureau of Indian Affairs, exemplifying Federal involvement with Indian bingo.

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[6] Through August 1986, bingo profits constituted approximately 50% of tribal revenues. Throughout the past three years bingo revenues have helped in paying tribal salaries and associated employee expenses; provided funds for repairs and maintenance on community facilities including water and sewer, tribal buildings, swimming pool, tribal vehicles, and heavy equipment; provided funds for professional and legal services; enabled the purchase of computer equipment, office, and heavy construction equipment; and further provided the opportunity for the Pueblo to operate a volunteer fire department and to secure BIA loans for commercial buildings. Local and national charitable foundations have been the recipient of Indian bingo "charity nights" where the bingo enterprise has generously sponsored winnings to be earmarked for charitable groups. See Appendix 1, letter from Governor of Pueblo of Sandia dated August 26, 1986.

[7] Sandia Indian Bingo also employs non-tribal and non-Indian individuals, paying $2,408,521 in salaries and wages. 36 tribal members employed at the bingo enterprise represent 29% of Sandia's labor force as of February 1985, and over half of the employees are non-Indians from the greater metropolitan Albuquerque area. The Pueblo has also purchased $2,880,289 in goods and services, primarily in the surrounding Albuquerque area. Tribal members employed by the Bingo are gaining business experience at every level of the operation. See Appendix 1, letter from the Governor of the Pueblo of Sandia, dated August 26, 1986.

2. PUEBLO OF SAN JUAN.

The Pueblo of San Juan has also enjoyed economic benefits from its bingo enterprise. To date the Pueblo has earned $75,662, which is used for tribal operations, as well as for community and government services.[8] Since its inception San Juan bingo has sharply reduced tribal unemployment and presently has an employment ratio of twenty-eight Indians to one non-Indian. The San Juan bingo operation also assists with fundraising activities for non-profit and charitable organizations.[9]

3. PUEBLO OF TESUQUE.

The Pueblo of Tesuque's bingo enterprise has been in operation since January 2, 1985. In its first year of operation it generated an enterprise equity of over $18,000.00, which funds were utilized in tribal government operations and for the public benefit of tribal members. The bingo operation employs twenty-eight tribal members and has significantly reduced unemployment among tribal members.[10]

4. PUEBLO OF ACOMA.

The Pueblo of Acoma initiated the first Indian bingo in New Mexico. It began operations in 1983 and has

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[8] The funds paid monthly to the Pueblo are determined by the profits earned for that particular month. Revenue generated from bingo activity is to be used specifically for community and government services. See Appendix 2, letter from the Governor of San Juan Pueblo.

[9] Over the period of its operation, San Juan bingo has assisted such organizations as the Santa Fe Indian School and the San Juan Pueblo Parish with fundraising activities. See Appendix 2, letter from the Governor of San Juan Pueblo.

[10] See Appendix 3, letter from the Governor of the Pueblo of Tesuque.

to date generated $387,000.00 as enterprise equity, which has been utilized for tribal programs, such as a child care center, funds for education, hot lunch program, provisions for flood victims, alcoholism programs, and elderly care programs. Further, the funds have aided in financing other tribal commercial ventures. Thirty-five tribal members are employed in the bingo operation directly, and ten more indirectly, such as in the food concession. The building which houses the bingo operation was funded by the Federal government through the Economic Development Act. As in other bingo operations, funds are provided to local charities, Indian and non-Indian alike.[11]

It is indisputable that the AMICI INDIAN PUEBLOS' bingo operations have greatly fostered the growth of the economies of the tribes, reducing unemployment and increasing revenues for tribal government operations and public tribal projects. (The benefits to non-Indian economies and to charitable organizations is incidental but noteworthy). It is manifestly clear that Indian bingo is successfully fulfilling the mandates of the Federal policy promoting Indian economic self-sufficiency. Moreover, the inextricable Federal involvement in Indian bingo, including the contribution of Federal dollars, is undeniable.

C. Consistent with national policy, bingo is a Federally-approved and comprehensively regulated business enterprise.

Even under the classic pre-emption tests, State regulation of Indian bingo is pre-empted by Federal law. As stated in *Chicago and Northwestern Transporta-*

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[11] See Appendix 4, letter from business manager of Acoma Development Authority.

tion, supra, a State statute must yield when it "stands as an obstacle to the accomplishment . . . of the full purposes" of a Federal action. 450 U.S. at 317. In *Ramah, supra*, the Court found that the Federal regulatory scheme covering the construction of Indian schools on reservation lands provided sufficient direction and supervision so as to pre-empt the State's authority to impose a tax.

Indian bingo is subject to a comprehensive regulatory scheme which clearly pre-empts any control over Indian bingo by States. Federal involvement derives partly from 25 U.S.C. 81, which relates to contracts with Indian tribes. In the case of *Wisconsin Winnebago Business Committee v. Koberstein*, 762 F.2d 613 (7th Cir. 1985), the Court of Appeals considered the dual question of whether bingo management agreements were agreements relative to Indian lands and, if so, whether Section 81 required that such agreements, in order to be valid, be approved by the Secretary of Interior. The Court held that, since the agreement involved the right to operate, maintain, and control the bingo facility on tribal trust lands, it was "relative to Indian land," that Section 81 applied, and that Secretarial approval was a condition precedent to the validity of the agreement. Similarly, in *United States, ex rel. Shakopee Mdewakanton Sioux Community v. Pan American Management Company*, 616 F.Supp. 1200 (D.C. Minn. 1985), the Court ruled that Section 81 applied to bingo agreements, making Secretarial approval necessary, and subjected the same to judicial review.

The Secretary of Interior, using his clear legal authority to approve or disapprove bingo agreements (and doubtless, by the impetus of the *Winnebago* and

Shakopee cases), has promulgated thorough and extensive guidelines for the review of bingo agreements. The first guidelines were issued on July 20, 1984, a supplement on April 9, 1985, and the current directive on April 7, 1986. *See* Appendix 5. These directives, it should be noted, are not limited to matters within the four corners of a bingo agreement but to a variety of other issues as well, such as the good character and reputation of any parties involved in Indian bingo operations. Thus, it is manifestly clear that not only is Indian bingo a business enterprise that is authorized by Federal law and judicial decision, but also it is one in which the Federal government is directly and actively involved. Indian bingo is carried on by Indians on Indian land for the purpose of generating revenues and profits to be utilized for essential tribal programs and services, a use that is squarely in keeping with our national policy of Indian self-sufficiency and economic independence.

That Congress regards Indian bingo as a national policy question is demonstrated in H.R. 1920, the Indian Gaming Regulatory Act, passed by the House of Representatives on April 21, 1986. A Congressional finding was specifically made on that point.[12] Com-

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[12] Section 2(a) of the Act states the following:

The Congress finds that

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue; . . . .

(5) a principal goal of federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and

ments by Congressmen emphasize the national nature of Indian bingo.[13] Whether H.R. 1920 or another bill becomes law, it is clear that Congress regards the matter of Indian bingo and Indian economic self-sufficiency as a national question. Under any pre-emption analysis, there is no question that a State is pre-empted from regulating Indian bingo over which the Federal government has vigorously exercised its regulatory authority. State laws simply do not apply over tribal matters unless Congress says so, *McClanahan*,

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strong tribal government; and

(6) tribal operation and licensing of gaming activities is a legitimate means of generating revenues.

[13] In floor discussion regarding H.R. 1920, on April 21, 1986, The Honorable Morris Udall, the Representative from Arizona, made the following observations:

> . . . for some tribes gaming enterprises has become an important source of tribal revenue. These commercial enterprises have provided employment for the Indian people. In some cases tribal unemployment has been reduced from fifty percent or more, to less then ten percent. Tribes are using revenue from gaming for health clinics, roads, scholarships, and numerous other economic and governmental and social efforts.

(132 Cong. Rec. No. 50 (1986) at p. 2016).

Similarly, the Honorable Bill Richardson, the Representative from New Mexico, stated,

> . . . As Federal resources are declining, Indian tribes are searching for ways to replace Federal sources of funding in order to meet their needs. In New Mexico, the Sandia, Acoma, and Tesuque Pueblos have turned to bingo as a source of tribal revenue to support their tribal governments and tribal programs.

(132 Cong. Rec. No. 50 (1986), at pp. 2016-2017).

supra; indeed, here Congress has stated quite to the contrary.

III. STATE LAWS REGULATING BINGO OPERATIONS ARE PRE-EMPTED INSOFAR AS THEY IMPERMISSIBLY INFRINGE ON THE INHERENT RIGHT OF TRIBAL SELF-GOVERNMENT.

A. The tribes' control of their own bingo operations is pursuant to their right to govern their internal affairs.

The cornerstone of the Indian pre-emption decisions is the affirmation of tribal sovereignty. This Court has consistently stressed that Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory." *New Mexico v. Mescalero*, *supra*; *White Mountain Apache*, *supra*. Because of their sovereign status, tribes and their reservation lands are insulated by historic immunity from State and local control. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973). The tribes retain any aspect of their historic sovereignty not "inconsistent with the overriding interests of the national government." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980). The sovereignty retained by the tribes includes the power of regulating their internal and social relations. *United States v. Wheeler*, *supra*; *New Mexico v. Mescalero*, *supra*. In the *New Mexico v. Mescalero* case, the Court reaffirmed the tribal right of self-government, saying, "a State may not act in a manner that infringes on the right of reservation Indians to make their own laws and be ruled by them." 462 U.S. at 332. In this case, the tribe had a program to develop and manage the reservation's wildlife and land resources to generate funds and provide employment for members. When the State at-

tempted to assert concurrent jurisdiction by enforcing its game laws against non-Indians for acts done on the reservation, the Court held that such State interference was not permissible, saying,

> We have stressed that Congress's objective of furthering tribal self-government . . . includes Congress's overriding goal of encouraging tribal self-sufficiency and economic development. . . . [W]e have held that tribes have the power to manage the use of their territory and resources by both members and non-members, to undertake and regulate economic activity within the reservation. (*Citing White Mountain Apache, supra*; *Merrion v. Jicarilla Tribe*, 455 U.S. 130, 102 S.Ct. 894 (1982); *Montana v. U.S.*, 450 U.S. 544, 101 S.Ct. 1245 (1981); 18 U.S.C. 1162(B); 25 U.S.C. 1321(B) and 1322(B).)

The rationale in the *New Mexico v. Mescalero* case squares exactly with the essential facts and circumstances of Indian bingo.

The Court further noted that the assertion of concurrent jurisdiction by the State would not only threaten to disrupt the Federal and tribal regulatory scheme but also would threaten Congress's overriding objective of encouraging tribal self-government and economic development, plainly standing as an obstacle to the accomplishment of the full purposes and objectives of Congress. Interference with tribal self-government through the application of the State's laws regulating Indian bingo on Indian land directly contravenes constitutional and federal policies and regulations to promote Indian sovereignty and to foster

economic development on the reservation. The plenary power of Congress over tribal sovereignty precludes such interference by the States since the broad power to regulate tribal affairs under the Indian Commerce Clause rests with Congress, not the States. Even though the right of tribal self-government is ultimately dependent on and subject to the broad power of Congress, the traditional notions of Indian self-government are so deeply ingrained in our jurisprudence that they have provided an important "backdrop" against which enactments must always be measured. *White Mountain Apache Tribe*, *supra*. Since Congress has exercised its power to enhance and promote tribal sovereignty, self-government, and economic development on the reservation by sanctioning and regulating Indian bingo, the State is pre-empted from applying its own regulatory scheme.

B. Even if the State had a legitimate interest in regulating Indian bingo, it is outweighed by Federal and tribal interests in promoting Indian economic development and self-government.

In the *White Mountain Apache* case, *supra*, the Court ruled that "When on-reservation conduct involving only Indians is at issue, State law is generally inapplicable," 448 U.S. at 144, and noted that, where the conduct of non-Indians is sought to be regulated, it is appropriate to utilize the "particularized inquiry" test to balance Federal, tribal, and State interests. *See also*, *Ramah*, *supra*. In our present case the bingo law sought to be applied would affect the conduct of tribes operating their own bingo games. It would appear that there would be no need for a particularized inquiry; State law would be inapplicable. However, if the circumstances are construed so that a particular-

ized inquiry were appropriate, the Federal and tribal interests significantly outweigh any State interests.

Current Federal policies and regulations support tribal bingo enterprises as a viable and significant means of improving economic conditions on the reservation and as a major step toward achieving the national goal of Indian economic self-sufficiency. Such a policy nurtures the strength and dignity of Indian tribes and encourages their exercise of a measure of self-government and fiscal autonomy. *Mashantucket Pequot Tribe v. McGuigan*, 626 F.Supp. 245 (D.Conn. 1986). It is apparent that the interest of the AMICI INDIAN PUEBLOS in the continuation of their bingo enterprises is substantial. The State's purported interest is the feared intrusion of organized crime. Noting that no instances of intrusion are cited by Appellants, the AMICI INDIAN PUEBLOS have had a completely different experience, with no instances of unlawful acts or disreputable actors.[14] The speculations of the State do not present the Court with an interest sufficient to outweigh the tribal and Federal interests, particularly when coupled with the thrust of the pre-emption doctrine.

The suggestion that there are gaps in law enforcement which would require State regulation is specious and unfounded. This assertion ignores the plethora of Federal statutes designed to prohibit corrupt or criminal activities in Indian country by Indians and non-

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[14] The Honorable Paul Bardacke, Attorney General for the State of New Mexico, testifying before the Senate Select Committee on Indian Affairs concerning H.R. 1920 on July 17, 1986, stated at page 8 of his prepared statement, "In New Mexico Indian bingo has not created any law enforcement problems." See Appendix 6, the complete text of Mr. Bardacke's statement.

Indians alike. A lengthy recitation of applicable Federal laws seems hardly necessary, but any reference would include the Federal Enclaves Act, 18 U.S.C. 1152, the Major Crimes Act, 18 U.S.C. 1153 (*see also*, 18 U.S.C. 1342). There is little doubt that Federal statutes of general applicability apply on Indian reservations. *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960); *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981); *United States v. Three Winchester 30-30 Caliber Lever Action Carbines*, 504 F.2d 1288 (7th Cir. 1974). Thus, it is clear that the Anti-Racketeering Act, 18 U.S.C. 1961, *et seq.*, which prohibits, *inter alia*, corrupt activities involving gambling, could relate to Indian bingo under the appropriate circumstances. There are numerous other Federal statutes, some relating to Indian country, and more relating to general prohibited activity. (*See*, for example, 18 U.S.C. 1151, 1154, 1156, 1160-1162, 1164, 3113, 3242, 3488, 3618-3619). Congress and the Federal judiciary have had almost 200 years to deal with the problem of filling any "gaps," and have done a good job. At any rate, for the purpose of assessing how substantial a State interest in this matter, it is greatly outweighed by Federal and tribal interests.

IV. IF THIS COURT WERE TO ACCEPT APPELLANTS' ARGUMENT, IT WOULD DIRECTLY CONTRAVENE THE PROVISIONS OF PUBLIC LAW 83-280.

Public Law 83-280, 67 Stat. 588, 18 U.S.C. 1162 and 28 U.S.C.S. 1360, gave six States criminal and civil jurisdiction over Indian country and permitted all other States to acquire it at their option. In the few States such as California where P.L. 280 is in

effect, there exists some applicability of State law over on-reservation activities. As was correctly stated below in the instant case, the grant of civil jurisdiction over Indian reservations has been limited by this Court to give States jurisdiction only over private civil litigation involving reservation Indians in State court, rather than making all State laws of general application effective on the reservation. *Bryan v. Itasca County*, 426 U.S. 373, 385 (1976); *Barona Group of Capitan Grande Band v. Duffy*, *supra*. Section 2 of P.L. 280 confers criminal jurisdiction over offenses committed by Indians on the reservation, thus authorizing the application of State criminal/prohibitory laws on Indian reservations, but not civil/regulatory laws. *Barona*, *supra*. In the few states where P.L. 280 applies, then, there is some shift away from the exclusive jurisdictional power of the Federal government and the tribes. But, as the Court below stated, under P.L. 280 the application of State jurisdiction over Indian tribes depends on an analysis of the criminal/prohibitory or civil/regulatory dichotomy. The Court in *Barona* held that a State law is criminal/prohibitory if the activity the statute addresses violates public policy, and civil/regulatory if the activity does not. The opinion below turns on the proposition that criminal/prohibitory laws can be applied in Indian country insofar as tribal bingo activities are concerned, whereas laws that are generally civil/regulatory in nature cannot. The analysis which distinguishes between criminal/prohibitory actions on one hand, and civil/regulatory actions on the other, permits that the application of the law be harmonized in P.L. 280 states and in non-P.L. 280 states as well.

The AMICI INDIAN PUEBLOS urge this Court to consider the impact of reversing the Court below on the basis of an interpretation of a law which is applicable in only a few States. It should be emphasized that few States have exercised the option afforded by P.L. 280 to assume certain criminal and civil jurisdiction over Indian country; there are many more States where P.L. 280 is not in effect than where it is. The majority of States chose not to take on the criminal and limited civil jurisdiction permitted by P.L. 280 and to undertake the significant attendant burdens.[15] Non-P.L. 280 States, such as New Mexico, essentially have left intact Federal jurisdiction over Indian country in addition to reaffirming the doctrine of tribal sovereignty. New Mexico has consistently adhered to the doctrine of Indian self-government and has rejected the Congressional offer of jurisdiction over Indian country and Indian people. *Jim v. C.I.T. Financial Services Corp.*, 86 N.M. 784, 533 P.2d 1222 (1974), *remanded on other grounds*, 87 N.M. 362, 533 P.2d 751 (1975). In that case, the Court stated that "... Indian tribes have preserved their tribal relations ... as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws ... of the state. ..." (citing *McClanahan v. State Tax Commission of Arizona, supra*; *see also*, *State v. Begay*, 63 N.M. 409, 320 P.2d 1017 (1958), *cert. denied*, 357 U.S. 918, 2 L.Ed. 1363.)

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[15] There are fifteen states with total or partial jurisdiction under P.L. 280: Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, Utah, Washington, Alaska, California, Nebraska, Minnesota, Oregon, and Wisconsin; the balance of the States are non-P.L. 280 states.

Appellants would have that this Court ignore the clear Congressional intent contained in P.L. 280 of affording States a binding option, and the clear intent expressed by the great majority of States in rejecting the effects of P.L. 280, and, by applying Procrustean logic, rule nonetheless that State law and enforcement thereof would apply fully to all Indian reservations. The manner in which criminal/prohibitory—civil/regulatory distinctions in a P.L. 280 State, are set out in the instant case below (and in the *Butterworth* and *Barona* cases), not only makes absolute sense but also is the sensible answer to applying a consistent national law which would bring into accord the conflicts which exist between P.L. 280 States on the one hand and non-P.L. 280 States on the other. This Court should feel impelled to embrace the essence of the decision below to achieve a harmonious and consistent application of the law.

CONCLUSION

Appellants would have this Court abruptly change the law which permits the conduct of Indian bingo and the fate of Indian tribes which have followed the dictates of national policy and engaged in enterprises specifically endorsed by the Secretary of Interior. For the reasons stated herein, it is respectfully urged that this Court affirm the decision below and continue its laudable tradition of enhancing tribal self-government and sovereignty, recognizing the plenary and largely exclusive power of the Federal government in dealing in Indian affairs.

Respectfully submitted,

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